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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1929.

FILE COPY

No.....

HILARY HALBERT, JR., DOROTHY HALBERT HUBBLE; MILDRED HALBERT, a Minor, by Hilary H. Halbert, Guardian *ad litem*; and FIFTY-ONE OTHERS, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION AND SUPPORTING BRIEF

OVERTON G. ELLIS,
A Member of the Bar of this Court,
Solicitor for Petitioners,
Tacoma, Washington.

STUART H. ELLIOTT,
H. G. ROWLAND,
DIX H. ROWLAND,
Counsel for Petitioners,
Tacoma, Washington.

The Puyallup Valley Tribune

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No.....

HILARY HALBERT JR., DOROTHY HALBERT HUBBLE; MILDRED HALBERT, a Minor, by Hilary H. Halbert, Guardian *ad litem*, Petitioners; RICH HALBERT, a Minor, by Fred P. Halbert, Guardian *ad litem*, Petitioner; VERNON SIDNEY HALBERT, a minor, by Benjamin F. Halbert, Guardian *ad litem*, Petitioner; SIDNEY E. HALBERT, a Minor, by Sidney Seth Halbert, guardian *ad litem*, *Petitioner;* ROSE PEERS PICKERNOLL, MABLE PEERS WHITE, AMELIA PEERS ALDEN, Petitioners; MARY FRANCIS PROVOE, LAURA M. BROWN, JOHN W. PROVOE, FRANK M. PROVOE, ROSA H. GARRARD, SARAH SPENCER, ISABELLE R. RAINEY, WILLIAM A. PROVOE, RAYMOND A. PROVOE, Petitioners; LULU M. ELLIOTT, SOPHIE M. ELLIOTT, CAROLYN M. ELLIOTT, MARION E. ELLIOTT, EMMA S. ELLIOTT, NORMA C. ELLIOTT, Minors, by J. H. Elliott, Guardian *ad litem*, *Petitioners;* ALVIN SMITH and EUGENE SMITH, Minors, by Lizzie Rolfson, Guardian *ad litem*, Petitioners; VIRGINIA WALKOWSKY, ALVIN WALKOWSKY, CATHERINE WALKOWSKY, Minors, by Kate Walkowsky Weiss, Guardian *ad litem*, Petitioners; MARY BARICHIO PETIT; NORRIS PETIT, ELLIS A. PETIT and OSCAR BRIGNONE, Minors by Paul Petit, Guardian *ad litem*, Petitioners; DEWEY BARICHIO, LEDA E. BARICHIO; ROMIE D. BARICHIO and ANDREW B. BARICHIO, Minors, by Vinie Wilson Barichio, Guardian *ad litem*, Petitioners; EDNA MAY ELLIOTT; RUTH G. ELLIOTT; WILLIAM H. ELLIOTT; JOHN G. ELLIOTT, FRANK L. ELLIOTT, JEWELL M. ELLIOTT, Minors, by William A. Elliott, Guardian *ad litem*, Petitioners; CHARLES G. ELLIOTT, JR., ANNA MARIE ELLIOTT, HENRY ELLIOTT, RALPH G. ELLIOTT, FRANCES ELLIOTT, Minors, by Chas. G. Elliott, Guardian ad litem, Petitioners; AGNES RUBENS; LOUISE HENRY PETERSON; MARY HENRY HAGEN; CHRIS HENRY, JR.; CHRISTINE HENRY and JUNE HENRY, Minors, by Louise E. Henry, Guardian *ad litem*, Petitioners,

—vs.—

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The above named petitioners pray that writs of certiorari issue to review the decrees, fourteen in number, of the Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on February 24, 1930, (R. 633 to 699) reversing the decrees of the United States District Court for the Western District of Washington, Southern Division, and respectfully show:

OPINIONS OF COURTS BELOW

The opinion of the District Court is printed in the Record at pages 285 to 375, and is not reported in the Federal Reporter. The opinions of the Circuit Court of Appeals are printed in the Record at pages 633 to 699 and are as yet unreported.

CASES WHEREIN REVIEW IS HEREBY SOUGHT

Fifteen cases were consolidated for hearing and appeal (R. 685 and R. 376). In these fifteen cases fifteen decrees, all bearing the same number, 5922, were entered by the Circuit Court of Appeals (R. 633 to 685). In one of those cases, namely, that of *United States vs. Archie Pellard*, the decree (R. 674) was so far favorable to said Archie Pellard that no review of that decree is sought. The

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Emphasis ours wherever used.

Pellard case was No. 306-E in the District Court. In each of the remaining fourteen cases the decision of the Circuit Court of Appeals was in favor of the United States, except that in the case of Lizzie Rolfson *et al.* (R. 650, 653) the decision was in favor of Lizzie Rolfson but against her two sons, Alvin Smith and Eugene Smith. The two sons, but not Lizzie Rolfson, are included among the petitioners herein.

PRELIMINARY STATEMENT

The cases in which writs of review are sought were begun in the United States District Court for the Western District of Washington, Southern Division, under and by virtue of the Act of August 15, 1894 (28 Stat. L. 305) as amended by the Act of February 6, 1901 (31 Stat. L. 760) (25 U. S. C. A., par. 345), authorizing Indians to sue the United States and other parties in interest for allotments of land denied them by the Secretary of the Interior. The jurisdictional grounds are pleaded in each case. (R. 2, 20, 38, 56, 92, 109, 129, 150, 169, 190, 209, 227, 248 267). The reservation concerned is the Quinaielt Reservation in Grays Harbor County, Washington.

The cases were all consolidated for the purposes of trial and appeal. (R. 376).

After a hearing before the trial court, the petitioners above named were allotted and at the same time seven of the plaintiffs were denied allottments.

The respondent, the United States, appealed all the cases in which allotments were granted. The plaintiffs who were not allotted did not appeal. (Opinion of Trial Court, R. 285 to 375). The Circuit Court of Appeals granted the allotment of Lizzie Rolfson personally (R. 683) and of Archie Pellard conditionally (R. 674). The Circuit Court of Appeals reversed the United States District Court in the cases involving these petitioners. (R. 644). Petitioners filed a petition for rehearing, which on the 31st day of March, 1930, was denied. (R. 685).

All the petitioners are Indians.

Names, Residence and Family Relationship of Petitioners.

The first six petitioners in the first four cases above named are admitted to be children of duly enrolled and allotted Indian fathers of the Quinaielt Reservation. (R. 9, 27, 45, 63). The names of the first four petitioners were on the Quinaielt roll for several years and dropped without notice so far as the record discloses. (R. 395). These petitioners live at Hoquiam, Washington, where their fathers and grandmother, Quinaielt allottees, have always resided, with the exception of the petitioner Rich Halbert, who lives within 200 feet of the confines of the Quinaielt Reservation. (R. 398).

The petitioners, Lulu M. Elliott, Sophie M. Elliott, Carclyn M. Elliott, Marion E. Elliott, Em-

ma S. Elliott and Norma G. Elliott, are children of an Indian father and an Indian mother, both of whom are enrolled, recognized and allotted Quinaielt Indians, (R. 131, 136), were born and reared at Dahlia, Wahkiakum County, Washington; their father is a fisherman, and the respondent has recognized, enrolled and allotted on the Quinaielt Reservation the father, mother, grandmother, fifteen uncles and aunts, and numerous cousins. (R. 130, 137, 485, 490). What has been said about the last group applies to the appellees in cases 324 and 325 in the District Court, except that in these cases the petitioners are children of an Indian father and a white mother, the father being allotted on the Quinaielt Reservation. (R. 227, 248).

The petitioners, Agnes Rubens, Louise Henry Peterson, Mary Henry Hagen, Chris Henry, Jr., Christine Henry and June Henry, are children of Louise E. Henry, who was enrolled and allotted on the Quinaielt Indian Reservation. They live where they have always lived. (R. 267, 273, 342, 490-491). This last group are children of a marriage between their Indian mother, Louise E. Henry, and a white man *contracted in* 1890. (R. 491).

The petitioners, Mary Barichio Petit, Norris A. Petit, Ellis A. Petit, are all offspring of an Indian father and Indian mother. Mary Barichio Petit is the daughter of Frank Barichio, an enrolled and allotted Quinaielt Indian, and Leda Givens, a

woman of part Indian blood. Norris A. and Ellis A. Petit are children of this Indian woman and Paul Petit, a recognized and allotted Quinaielt. Petitioner Oscar Brignone is a grandson of Ellen Amelia Springer, Quinaielt allottee No. 595. The petitioner Dewey Barichio is a full blood brother of Mary Barichio and the son of Frank Barichio. The wife of petitioner Dewey Barichio, and the mother of petitioners, Romie D., Leda E. and Andrew B. Barichio, is Vinie Wilson, duly enrolled and allotted on the Quinaielt Indian Reservation. (R. 550 to 553, 569-573).

The Barichio and Petit families live on Shoalwater Bay, Washington, with the colony of Quinaielt Indians there residing, virtually all the members of which were allotted on the Quinaielt Indian Reservation prior to 1908. (R. 493-495, 498). This family is of mixed Quinaielt and Lower Chehalis blood, (R. 550-553), and under the stipulation (R. 421), its members should be allotted.

The petitioners, Rose Peers Pickernoll, Mabel Peers White and Amelia Peers Alden, are the children of an Indian father, Henry Peers, a lower Chehalis Indian (R. 519), and an Indian mother, Judith Ducheney, (R. 93, 98, 99), a Quinaielt Indian, a sister of Agnes Elliott, allotted on the Quinaielt Indian Reservation. Petitioner Rose Peers Pickernoll is the wife of an allotted Quinaielt Indian. (R. 520).

The petitioners, Virginia, Alvin and Catherine Walkowsky, minors, are children of an Indian woman, Kate Walkowsky Weiss, a Quinaielt Indian, and a white man, John Walkowsky, whom she *married January* 9, 1893. The petitioners are full blood brother and sisters of Albert Walkowsky, Louise Walkowsky, Frank Walkowsky, Ida Walkowsky,Grace Walkowsky Griggs, Leonard Walkowsky, Rose Walkowsky and Kenneth Walkowsky, all of whom are duly enrolled and allotted upon the Quinaielt Indian Reservation. (R. 521, 522). Petitioners live with their mother, Kate Walkowsky, at Shoalwater Bay, Washington, among that branch of the Quinaielt tribe heretofore referred to. (R. 498, 521, 542). These petitioners are the offspring of a full blood Indian mother, either Quinaielt or a Lower Chehalis by blood, (R. 521, 542, 543, 546), and, under the stipulation at page 421 of the record, are entitled to be allotted.

The petitioners, Eugene Smith and Alvin Smith, are children of Lizzie Rolfson, allotted on the Quinaielt Reservation by the District Court and the Circuit Court of Appeals, (R. 683), the latter court affirming the District Court by finding her to be a Lower Chehalis Indian. The Circuit Court of Appeals follows the stipulation of the lower court agreeing that Lower Chehalis Indians are entitled to allottment. (R. 421). Eugene and Alvin Smith were born of a marriage of an Indian woman, Lizzie

Rolfson, and a white man, said *marriage* having been *solemnized* in the year *1887*. The petitioners were born, reared and lived most of their lives at Hoquiam, Washington, where their mother now livs. (R. 391 to 393, 472-476).

The petitioners, Mary Francis Provoe, Laura M. Brown, John W. Provoe, Frank M. Provoe, Rosa H. Garrard, Sarah Spencer, Isabelle R. Rainey, William A. Provoe and Raymond A. Provoe, are members of the Chehalis tribe of Indians of which the Quinaielt is a branch, and are all fish-eating Indians of the Pacific Coast, residing in Southwestern Washington in the vicinity of the Quinaielt Indian Reservation. (R. 586-590, 596-600). It should be noted that the expression, "fish-eating Indians" is used in the Executive Order of November 4, 1873, (Appendix "C" hereto). Mary Francis Provoe was married to an Indian, David Provoe, in 1870, who was the father of the above named petitioners. R. 587, 588). Petitioners were recognized as belonging to the Quinaielt tribe in 1912 by an unanimous vote of the Quinaielt council. (R. 586, 587).

Resume of History of Allotment of Quinaielt Reservation.

Allotments on the Quinaielt Indian Reservation in Washington began in 1905 under the General Allotment Act of 1887. The first roll of 119 names was submitted in 1907, the second of 327

names in 1908, and the third of 300 names in 1910. Thus, 746 Indians were allotted on the Quinaielt Reservation before the passage of the Act of March 4, 1911. (See Appendix "F"). (R. 437).

In 1908, the Superintendent of the Quinaielt Indian Reservation accompanied the Commissioner of Indian Affairs to the Quinaielt Reservation, and later, the Superintendent, Commissioner of Indian Affairs and the Secretary of the Interior, Mr. Garfield, held a conference in Washington when it was decided that, owing to the peculiar situation of the Quinaielt Reservation, the scattered fish-eating Indians in Southwestern Washington should be recognized and allotted without residence. (R. 499). Carrying out this policy, the Quinaielt and associated Indians living at Shoalwater Bay were allotted on the Quinaielt Reservation in 1906 or 1908 to the extent of over 100, without applications. Trust patents were issued to them and the Superintendent of the Quinaielt Reservation was sent to Shoalwater Bay to advise the Indians to accept their patents and to tell them that residence on the reservation would not be required of them. (R. 494). These Indians never resided on any reservation. Among these are included the entire settlement at Georgetown, sixty miles from the Quinaielt Reservation. (R. 425, 426).

Since the above schedules were approved, 746 or 747 additional Indians have been allotted and

such allotments approved by the Secretary. These allotments were made under the Act of March 4, 1911. Of all the names on these schedules, only six ever lived on their allotments. (R. 446). Of all the Indians allotted, only 200 live on the Reservation, these being at the fishing villages of Taholah and Queets. (R. 383). The allotting on the Quinaielt Reservation was discontinued after the filing of the schedule of 1910, as the Interior Department had decided that timber land was not allotable, and was not resumed until after the decision of this Court in the case of *Tommy Payne v. The United States*, in 1924, 284 Fed. 827, 264 U. S. 446. Allotment work was resumed in 1925 and this litigation ensued. Residence upon the Quinaielt Reservation or any reservation was not essential for allotment. (See Executive Order of 1873, Act of March 4, 1911, and Allotment Instructions in Appendix "C" "F" and "H"). The Quinaielt Reservation is a heavily timbered area. Residence thereon is not possible until the land is cleared and fit for cultivation. (R. 383, 404, 426, 500). As testified by Allotting Agent Roblin, the Act of 1887 did not require residence in order for an Indian to secure an allotment on a reservation. (R. 443). (Excerpt from Act of 1887 in Appendix "D").

The Quinaielt Indian Reservation, as originally surveyed and set apart, consisted of only 10,000 acres (R. 469). At the time of the treaty in 1855

and 1856 (see Treaty in Appendix "A"), the Quinaielt Indians numbered only 158. (R. 386). The reservation was enlarged by the Executive Order of November 4, 1873 (see Appendix "C"), to nearly 224,000 acres. (Bureau of American Ethnology, Handbook of American Indians, Part 2, Page 388, Executive Order of November 4, 1873, in Appendix "C," R. 436, 442 and 443). This Executive Order was promulgated under the terms of the treaty with the Quinaielts and other Indians giving the President of the United States the right to combine the Indians in the treaty with other friendly bands and tribes of Indians, (see Article 6 of Treaty in Appendix "A"), and "To provide for other Indians in that locality" and "other tribes of fish-eating Indians on the Pacific Coast." (See Executive Order of November 4, 1873, in Appendix "C").

The Executive Order referred to was promulgated because Congress had passed the Act of March 3, 1871, (R. S. 2079; see Appendix "B"), prohibiting further treaties with Indian tribes and declaring that they should no longer be recognized as independent nations and tribes.

All the petitioners come within the saving clause of the Act of June 7, 1897, (see Appendix "E"), or are the children of Indian fathers, or are the children of Indian fathers and Indian mothers.

The Act of March 4, 1911, specifically provides for the allotment of Indians who do not reside on the reservation. (See Appendix "F").

The Indians who have heretofore been allotted lands in severalty on the Quinaielt Reservation without the necessity of their being adopted into the Quinaielt tribe and without requiring residence on any reservation, are individual members of the following tribes and bands in that locality (Quinaielt Reservation) consisting of Quinaielt, Quileutes, Queets, Hohs, Upper Chehalis, Lower Chehalis, Chinooks and mixed bloods of the above named tribes and bands, all fish-eating Indians of the Pacific Coast of Washington. (R. 411, 412, 421, 426, 443, 445, 447, 448, 466, 576, 481, 493, 494, 495, 496, 498, 499, 500, 502, 503, 506, 526, 531, 534, 535, 551, 552, 553, 569).

It is agreed and stipulated that Lower Chehalis Indians are entitled to allotment on the Quinaielt Indian Reservation. (R. 421).

Findings of District Court Not Questioned by Circuit Court of Appeals.

The decisions of the Circuit Court of Appeals in these cases do not question the findings of the trial court as set forth in the memorandum decision of District Judge Cushman (R. 285) as to the family relationship or the tribal relationship of the petitioners nor do they, nor does the record, question

the enrollment, recognition and allotment of numerous members of the families of petitioners, nor do they question the findings of the District Judge as to the date of the several marriages of petitioners parents. The decisions of the Circuit Court of Appeals are based solely upon the questions of nonresidence on an Indian Reservation, the application of the Act of 1897 to the cases and the lack of tribal affiliation, and seem to carry the idea that the record does not show that petitionres exhausted their efforts with the Secretary of the Interior before suing for their allotments. (R. 669). The evidence in these cases and the express stipulation of the parties show that the petitioners did everything on their part to secure their rights before resorting to the Courts. (R. 527). Stipulation of Counsel (R. 528). Surely nothing unreasonable should be expected of these Indians in this respect, and the fact that respondent is opposing these allotments, on grounds denying their legal right to allotment, shows that no such technical contention has merit.

In closing this statement we will review the facts as disclosed by the records. Allotments on the Quinaielt Reservation began in 1905 (R. 437), when Honorable James R. Garfield was Secretary of the Interior. They were discontinued in 1910, (R. 437), by Honorable Richard A. Ballinger, the then Secretary of the Interior, on the ground that

the Quinaielt Indian Reservation, being timberland and unsuited to agriculture, was not the subject of allotment. In 1911 and 1912, when Honorable Walter L. Fisher was Secretary of the Interior, an allotting agent was again sent out and many of these petitioners did all possible to go upon the reservation and secure allotments. (R. 343). But no allotments were made during the administration of Secretaries of the Interior, Honorable Franklin B. Lane, Honorable John B. Payne, Honorable Albert B. Fall, and during this time the Department of the Interior sought to sell the timber (and as to a very large number of allotments, did sell it). The sale of the timber has had the practical effect of preventing any Indian from living on the allotments. Not until 1924, after this court had reversed the policy of the Department of the Interior in the case of *Payne vs. the United States*, 264 U. S. 446, was any effort made to allot. In 1925, when Honorable Hubert Work was Secretary of the Interior, allotment work was resumed. This was continued during the administrations of Honorable Ray O. West and the present Secretary of the Interior, Honorable Ray Lyman Wilbur.

The decision of the Circuit Court of Appeals does not pass upon the fact that these petitioners have never had an opportunity to live on any reservation, and that every complaint contains the following allegation:

"That, notwithstanding all of the facts hereinbefore alleged, the defendant, its officers and agents, have unlawfully failed, neglected and refused to allot the said land to the plaintiffs herein . . . . and have denied the excluded, and still deny and exclude plaintiffs herein from said land, and have refused and still refuse to let the said plaintiffs go upon or reside upon said lands or any portion thereof; that said plaintiffs are entitled to have said lands so selected allotted to them and desire that the same be allotted to them and that their rights be recognized and that they may be permitted to go upon, live upon, cultivate and improve said lands as their homes."

showing a willingness on the part of the petitioners to go on the reservation and make their homes as soon as the timber is removed and the reservation fit for occupancy. (R. 6, 10, 24, 25, 28, 42, 43, 46, 60, 61, 64, 96, 99, 114, 118, 133, 134, 137, 154, 155, 158, 173, 174, 177, 178, 194, 195, 198, 213, 214, 217, 231, 232, 236, 252, 253, 256, 270, 271, 274-275). The allegations just quoted, so far as concerns the facts stated, are in substance admitted by the answers, (R. 10, 28 etc.).

Nor does the Circuit Court of Appeals pass upon the fact that the Department has at all times told the Indians of Southwestern Washington that

they could continue to live off the reservation and would thereby in no way jeopardize their rights on the reservation given them by the Executive Order of November 4, 1873, and the Act of March 4, 1911. (R. 494-499). (Appendix "C" and "F").

IMPORTANT QUESTIONS PRESENTED

I.

IS A FISH-EATING INDIAN OF THE PACIFIC COAST, UNDER THE EXECUTIVE ORDER OF NOVEMBER 4, 1873, WHO DOES NOT RESIDE UPON ANY INDIAN RESERVATION, BUT LIVES IN THE ORIGINAL TRIBAL HABITAT OF HIS ANCESTORS, TO BE DENIED AN ALLOTMENT OF LAND ON THE QUINAIELT RESERVATION, WHEN THE QUINAIELT INDIAN RESERVATION WAS ENLARGED FROM 10,000 ACRES TO 224,000 ACRES EXPRESSLY TO PROVIDE FOR HIS USE AND ALLOTMENT, AND WHEN SUCH INDIAN HAS NEVER BEEN PERMITTED TO GO UPON OR RESIDE UPON THE QUINAIELT INDIAN RESERVATION?

The trial court found and the evidence sustains the finding that all of the petitioners were fish-eating Indians of the Pacific Coast and were qualified under this Order, and were either Quinaielt Indians by blood or members of the Lower Chehalis or Upper Chehalis, and in the case of the Provoe petitioners, that they were Cowlitz Indians. The District Judge who tried the case and whose opinion (R. 285-375) shows him to be a pro-

found student of Indian history of Southwestern Washington, took up each group separately and made findings in his decision that all these petitioners were fish-eating Indians of the Pacific Coast, identified with, associated and affiliated with, and intermarried with members of the Quinaielt tribe, being either descendants of one or both Quinaielt parents or descendants of Upper and Lower Chehalis or remnants of the Chinook band of Southwestern Washington.

The entire record sustains these findings, and they are not questioned by the respondent nor by the opinions of the Circuit Court of Appeals. (R. 386, 387, 390, 411, 421, 426, 427 and whole record).

The Handbook of American Indians, Volume 1, Page 272, states that in 1907 the Chinooks had completely fused with the Chehalis, so under the stipulation at page 421 of the Record, such of petitioners who are of Chinook ancestry would be entitled to allotment on the Quinaielt Indian Reservation.

The decision of the Circuit Court of Appeals makes no reference to the admitted allegations in the complaints hereinbefore quoted, which expressly state that all the petitioners have attempted to go upon and locate upon the Quinaielt Reservation, but have been denied such right, and excluded therefrom, and that they are willing to go upon the reservation and make their home thereon, as set forth

on page 15 of Preliminary Statement. That the reservation was enlarged from 10,000 to 224,000 acres is not disputed.

II.

SHOULD THE SAME RULE MAKING AN ACTUAL PRIOR RESIDENCE A REQUISITE FOR ALLOTMENT BE APPLIED TO A RESERVATION LIKE THE QUINAIELT RESERVATION, WHICH IS SO HEAVILY TIMBERED THAT RESIDENCE UPON IT IS IMPOSSIBLE UNTIL THE LAND IS CLEARED, AS IS APPLIED TO A RESERVATION WHERE THE LAND IS IMMEDIATELY SUITABLE FOR AGRICULTURE AND WHERE NO LARGE LAND CLEARING OPERATIONS ARE NECESSARY BEFORE HOMES CAN BE ESTABLISHED THEREON?

The entire record shows that the Quinaielt Indian Reservation is a heavily timbered area, and the Department of the Interior suspended allotments from the year 1910 to 1925. When allotments were resumed in the year 1925, 700 allotments were made, three-fourths of which were made to non-residents under the policy and regulations of the Secretary and other officers of the Department of the Interior who knew and realized the situation as set forth under this sub-head.

III.

SHOULD THE ACT OF MARCH 4, 1911, (see Appendix E), BE CONSTRUED AS DENYING ALLOTMENT TO INDIANS WHO, THOUGH OTHERWISE QUALIFIED TO

RECEIVE ALLOTMENTS, DO NOT RESIDE UPON THE QUINAIELT RESERVATION, WHEN THE EXECUTIVE ORDER OF NOVEMBER 4, 1873 (see Appendix C), PROVIDES "FOR OTHER INDIANS IN THAT LOCALITY," AND WHEN THE ACT OF MARCH 4, 1911, ITSELF PROVIDES FOR ALLOTMENTS "FROM SURPLUS LANDS ON THE QUINAIELT RESERVATION AFTER ALLOTMENTS TO INDIANS THEREON HAVE BEEN COMPLETED?"

It is admitted that the petitioners are descendants of Quinaielt Indians or are fish-eating Indians of "that locality," intermarried and affiliated with the Quinaielts, residing immediately south of the border of the Quinaielt Reservation in the country of the Lower Chehalis tribe extending from the south boundary of the Quinaielt Indian Reservation to the southerly end of Shoalwater Bay.

It is further admitted that all the Indians on the reservation have been allotted, and that petitioners are claiming their allotments from the surplus allottable lands, Allotting Agent Roblin testifying that there are approximately 195,000 acres of allotable land, sufficient to allot 2,200 Indians (R. 442, 443), and that only 1,414 Indians have been allotted on the Quinaielt Reservation. (R. 437, 449, 466).

The Executive Order of November 4, 1873, and the Act of March 4, 1911 (see Appendices "C" and "F"), clearly indicate the intention that In-

dians other than those who live upon the Quinaielt Reservation or upon any Indian Reservation, shall be entitled to the benefits of the act.

IV.

SHOULD THE ACT OF JUNE 7, 1897, (see Appendix E), BE CONSTRUED AS DENYING ALLOTMENTS TO CHILDREN OF A MARRIAGE OF AN INDIAN WOMAN AND A WHITE MAN WHICH WAS SOLEMNIZED PRIOR TO THE PASSAGE OF THE ACT, OR TO CHILDREN OF AN INDIAN FATHER, OR TO CHILDREN OF AN INDIAN FATHER AND AN INDIAN MOTHER, WHERE THESE CHILDREN (PETITIONERS HEREIN), WHOSE PARENTS (ONE OR BOTH) ARE RECOGNIZED AND ALLOTTED QUINAIELT INDIANS, WERE BORN, REARED AND NOW LIVE IN THEIR ANCIENT TRIBAL HABITAT?

The petitioners, Virginia, Alvin and Catherine Walkowsky, are the children of Kate Walkowsky Weiss, a duly enrolled and allotted Quinaielt Indian. *Kate Walkowsky Weiss was married to a white man January* 9, 1893, (R. 521), and the petitioners are children of that marriage. (R. 522). Eight other of her children were allotted. (R. 522). The entire family, including the petitioners, were all born, reared and have always lived at Shoalwater Bay in Southwestern Washington. (R. 542). Kate Walkowsky Weiss, though duly enrolled and allotted, neved lived upon the Quinaielt Reservation. (R. 543).

The petitioners, Agnes Rubens, Louise Henry Peterson, Mary Henry Hagen, Chris Henry, Jr., Christine Henry and June Henry, are all the children of an Indian woman, Louise E. Henry, and a white man, who were married in the year 1890. (R. 491).

Louise E. Henry, the mother of the above petitioners, is a duly enrolled and allotted Indian of the Quinaielt Reservation. (R. 267-268, 273, 342).

Louise E. Henry and the above named petitioners have always lived at Dahlia, in Southwestern Washington, and now reside at said place; and Louise E. Henry was living at said place when she was enrolled and allotted upon the Quinaielt Indian Reservation.

All of said petitioners, aside from being Quinaielt Indians, are protected in their rights to tribal lands and tribal property by the saving clause of the Act of June 7, 1897.

The Act of June 7, 1897, (see Appendix "E"), has no application to the children of an Indian father, or the children of an Indian father and Indian mother, and the District Court so found. All petitioners come within this classification excepting those in the case in which Virginia Walkowsky and others are plaintiffs, the case in which Louise E. Henry and others are plaintiffs, and the case in which Alvin Smith and Eugene Smith are plaintiffs.

V.

SHOULD THE PETITIONERS BE DENIED THEIR RIGHTS TO ALLOTMENTS ON THE GROUND THAT THEY LIVE IN MIXED WHITE AND INDIAN COMMUNITIES, THE ORIGINAL TRIBAL HABITAT OF THEIR TRIBE OR BAND, AND NOT UPON ANY RESERVATION, IN VIEW OF THE EXECUTIVE ORDER OF NOVEMBER 4, 1873, AND THE ACT OF MARCH 4, 1911?

In this connection it is well to observe that the treaty provided in Article 2, Kappler's Laws & Treaties, Vol. II, page 719:

> 1st. "And the said tribes and bands agree to remove to and settle upon the same (the reservation) within one year after the ratification of this treaty, or sooner if the means are furnished them."
>
> 2nd. "In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant."

Article 6 of the Quinaielt Treaty (Volume 2, Page 720, Kappler's Laws & Treaties) provided that the said reservation might be assigned to individual Indians who should elect to locate on the reservation as a home under the terms of the treaty with the Omahas, *so far as the same may be applicable,*

(see Article 6 in Appendix "A") and the same Article 6 provided that the President of the United States might consolidate the Indian tribes signing the treaty with other friendly tribes and bands. (See Article 6, Appendix "A").

We have heretofore discussed and will hereafter discuss the reasons why the petitioners did not and could not live upon the Quinaielt Reservation when they first applied for allotments, and have shown that the Executive Order of 1873 and the allotment Act of March 4, 1911, were not designed to exclude petitioners, but to include them.

That Congress had in mind at all times that Indians were not to be penalized for adopting the habits and customs of civilized life and associating and affiliating with the white people, (which in these cases was involuntary) was first exemplified by the Act of June 14, 1862 (12 Stat. L. 427, R. S. 2119), dealing with the protection of Indians desiring to adopt the habits of civilized life.

Next, the Act of March 3, 1875, (18 Stat. L. 420) dealing with Indians abandoning tribal relations, being entitled to the benefit of the homestead law, but at the same time saving their rights to all tribal property.

Then came the Allotment Act of February 8, 1887, (24 Stat. L. 388) (see Article 6 in Appendix "A"). This act provided for allotments in sever-

alty and was aimed to break up finally all tribal association.

Then the Act of August 9, 1888, (25 Stat. L. 392), the Act of June 7, 1897, (30 Stat. L. 90) and the Act of May 8, 1906, (34 Stat. L. 182). Then finally the Citizenship Act of June 2, 1924, (see Appendix "G"). All of these Acts of Congress, and many others of like tenor, show a studied policy, a direct intent on the part of Congress that these people should not be penalized for giving up the customs and habits of their forefathers and living as civilized men. All these acts are particularly applicable to the situation of the petitioners who could not go upon the reservation owing to conditions described herein.

REASONS FOR GRANTING THE WRITS.

I.

(CONFLICTS OF DECISIONS OF CIRCUIT COURTS OF APPEAL AND OF OTHER COURTS; TREATY, STATUTES, ETC. NOT YET CONSTRUED)

The Circuit Court of Appeals decided a number of questions of Federal law, involving an Indian Treaty, an Executive Order and several acts of Congress, and decided those questions in a way which is either in conflict with the applicable decisions of this Court, or else have not been, but should be, authoritatively decided by this Court in the public interest.

1. The Circuit Court of Appeals held that under the Quinaielt Treaty of 1855-1856 (10 Stat. L. 1043), residence and location on a reservation is a prerequisite to an allotment, and bases this reasoning upon the sixth article of the Treaty with the Omahas. (10 Stat. L. 1043).

It is observed that Article 6 of the Quinaielt Treaty is based upon Article 6 of the Omaha Treaty, *"so far as the same may be applicable."*

The Circuit Court of Appeals strictly construes Article 6 of the Omaha Treaty and applies it to the Quinaielt situation, overlooking entirely the words in the Quinaielt Treaty, that it should follow the Omaha Treaty *"so far as the same may be applicable,"* and to the situation there existing.

2. This decision is in conflict with the decision of the same Circuit Court of Appeals in the case of *Bonifer vs. Smith*, 166 Fed. 846, construing a similar provision contained in the Treaty with the Walla Walla, etc., Indians (12 Stat. L. 954), Article 6. It is also in conflict with the decision of this Court in the case of *Hy-yu-tse-mil-kin vs. Smith*,, 194 U. S. 401.

3. The decision of the Circuit Court of Appeals overlooks the fact that in each of the complaints there is contained an allegation that each of the petitioners desires to go upon the reservation and locate thereon, but has been denied that right,

and that these allegations are in substance admitted. (See Statement page 15).

4. The decision of the Circuit Court of Appeals is in conflict with the construction placed upon the Treaty by the rules and regulations and decision of the Department of the Interior, from the year 1905 down to the present time, as is shown by the statement that only 200 out of 1414 allottees live upon the reservation and but 6 live upon their allotments. The decision is also in conflict with the decision in the case of *Francis C. Mounts, et al, vs. United States*, Equity No. 385, in the District Court for the Western District of Washington, wherein a consent decree was entered in November, 1929, pursuant to the opinion of the Secretary of the Interior dated November 1, 1929. (The Attorney General SWR-M 90-2-11-143 A. L.; see Appendix I).

5. The decision of the Circuit Court of Appeals conflicts in this particular with the decisions of the United States District Court for the Western District of Washington, in the case of *Agnes Elliott, et al vs. United States*, (Equity 272), the case of *Anna Jette Jackson vs. the United States* (Equity 222), *Tim Driscoll vs. the United States* (Equity 271), *Daisy Borg vs. the United States* (Equity 240), and the case of *Ellen Baker, et al, vs. the United States* (Equity 250) (Unreported), all these cases being decided in June of 1926, and never ap-

pealed by the United States. This conflict is mentioned to show the complete reversal of the attitude and policy of the Department toward these Indians.

6. The contention that this treaty requires residence and location on an Indian reservation as a condition to allotment, has never been passed upon by this Court, and this Court has never passed upon the effect of the refusal of the Department of the Interior to permit an Indian to locate upon a tract of land upon an Indian reservation to which he claims the right to an allotment.

II.

The Circuit Court of Appeals holds that the Executive Order of November 4, 1873, applies only to Quinaielt, Quileute, Hoh, Ozettes and Quits or Quaitso (Queets) Indians, and then states that the Hohs are but a band of Quinaielts, and the Quits or Quaitso a part of the Quinaielt tribe. (R. 638, 639). This leaves, as entitled to allotments, only the Ozettes, who, in 1901, numbered 44, and in 1906 numbered 35. (Handbook of American Indians. Part 2, page 180).

The Executive Order of November 4, 1873, (Kappler Ind. Affairs, Laws and Treaties, Vol. I, 2nd Ed., pp. 923-924) by its terms increases the reservation from 10,000 to 224,000 acres and provided:

"*for other Indians* in that locality"

and that it be withdrawn from sale and set apart for the use of the

> "Quinaielt, Quillehute, Hoh, Quits, *and other tribes* of fish-eating Indians on the Pacific Coast."

This Court has never passed upon or construed the Executive Order of November 4, 1873.

III.

The decision of the Circuit Court of Appeals fails to give effect to the provisions of the Act of June 7, 1897, (See Appendix E) and is in conflict with its own decision, with the many unappealed decisions of the District Court of the Western District of Washington, Southern Division, alloting the Quinaielt Reservation, the decisions of other United States Circuit Courts of Appeal, the decisions of the United States Court of Appeals for the District of Columbia, and the rulings of the Department of the Interior construing this Act.

The petitioners herein may be placed in three classes:

(a) Children of the marriage of a white man and an Indian woman, said marriage having been solemnized prior to the Act of June 7, 1897.

(b) Children of an Indian father. The wording of the Act of 1897 clearly shows that

it has no application to this class. The trial court so held but was reversed by the Circuit Court of Appeals.

(c) Children of an Indian father and an Indian mother. The Act has no application to this class. Trial court so held but was reversed by Circuit Court of Appeals.

1. The decision of the Circuit Court of Appeals conflicts with the decision of the same court in the case of *Pape vs. United States* (19 Fed. 2nd 219), wherein it is held that the children of a white man and an Indian woman follow the status of their father. In the case of some of the petitioners, such as the Halbert children and the children of William A. Elliott and Charles G. Elliott, the decision of the Circuit Court of Appeals passes over the father, who in each case is an enrolled, recognized and allotted member of the tribe, to the grandmother as a basis for disqualifying such petitioners.

2. The decision of the Circuit Court of Appeals also conflicts with the decision of the same court in the case of *Bonifer vs. Smith* (166 Fed. 846). In this case it was said:

"We are not justified in assuming that it was the intention to lay down the rule that the allotment was not intended for the benefit of Indians who at the time were residing neither on the reservation nor within the limits of the

lands included in the cession of territory to the United States."

3. The decision conflicts with the local decisions of the District Court which were final and acquiesced in by the Department. The cases are cited at page 26 of this petition.

4. The decision conflicts with the decision of the United States Circuit Court of Appeals for the Eighth Circuit as announced in the case of *Vezina vs. United States* (245 Fed. 411) Plaintiff in that case was one of eight children of an Indian mother and white father, married prior to the Act of June 7, 1897. Plaintiff was born and reared in Canada, she later lived in St. Paul, then married a Frenchman, moved to Mendota, Wisconsin, and then to Minneapolis. The Court held that plaintiff under this statute (June 7, 1897) is clearly entitled to be recognized and treated in all respects as if she had remained on the reservation. (R. 420 opinion).

5. The decision conflicts with the decision of the United States Circuit Court of Appeals, Eighth Circuit, in the case of *Oakes et al vs. United States* (172 Fed. 305). In that case the daughter of Mrs. Oakes, an Indian named Jane B. Jones, was allotted land on a reservation, though this daughter was born and reared in the City of St. Paul off the reservation, because she was born of a marriage between an Indian woman and a white man solemnized prior to the passage of the Act of 1897.

The petitioners herein who are the children of Louise E. Henry, Kate Walkowsky Weiss, and Lizzie Rolfson, all Indian mothers, are children of marriages of white men and Indian women solemnized before the passage of the Act of 1897. The mothers of these petitioners were encolled, recognized and allotted as members of the Quinaielt tribe of Indians.

6. The decision conflicts with the decision of the Court of Appeals of the District of Columbia in the case of *United States ex rel. Besaw vs. Work* (6 Fed. 2nd. 694).

In that case it is stated at page 695 that relator Besaw did not remove to the reservation but continued to reside upon his farm separate and apart from the tribe. He had never taken up his residence on the reservation. At page 697 of the decision it is held that relator Besaw comes within the saving provisions of the Act of June 7, 1897, and his right is sustained.

Of a like nature is the case of *Work vs. United States ex rel. Gouin*, Court of Appeals, District of Columbia, (18 Fed. (2nd) 820) where applicant lived in North Dakota and was held entitled to her rights on the White Earth Reservation in Minnesota.

7. The decision of the Circuit Court of Appeals conflicts with the decision of the Secretary of the Interior in the case of *Crichton vs. Shelton* (33 L. D. 205), where it was held that under the

Act of 1887 reservation Indians were not required to settle upon, improve, or maintain a residence upon their allotments, and the childrens' rights would be preserved by the Act of June 7, 1897.

8. The decision also conflicts with the decision of the Secretary of the Interior in the case of *Addie Prickett et al* (50 L. D. 554) where it was held that children born of a marriage of an Indian woman and a white man solemnized prior to the Act of June 7, 1897, the mother then living apart from the tribe, did not have to be born on the reservation or among Indians in order to share in tribal property.

9. The decision also conflicts with the decision of the Department in the case of *Francis C. Mounts, et al, vs. United States*, Equity No. 385. United States District Court for the Western District of Washington, Southern Division, wherein it was stipulated by the Secretary of the Interior and the Attorney General that a decree be entered in a case brought by one Frank Mounts, Indian father, upon behalf of his three minor children, neither Frank Mounts nor his minor children ever having lived upon any Indian reservation. This decision was rendered November 1, 1929, just six days prior to the argument of these cases before the Circuit Court of Appeals and after briefs were filed in these cases. (See Appendix I).

10. The decision also conflicts with the allotment instructions of the Department of the Interior as contained in Section 324 of the Regulations, 1904, as amended. (See Appendix H), the same being in effect at the time of these trials in the District Court. (R. 439-441).

Under these instructions 1414 Indians have been allotted upon this reservation, only 200 of whom ever lived upon the reservation. (R. 383-466).

IV.

The Circuit Court of Appeals in its opinion in the Rolfson case (one of the cases included in the present petition), concludes that the Chehalis Indians (of whom the Quinaielt is but a branch) Upper and Lower Chehalis, and the Cowlitz Indians, were not affiliated with the Quinaielt and Quillehute tribes in the Treaty of 1855 and 1856 within the meaning of the Act of Congress of March 4, 1911. (Appendix F) (R. 666).

That as the Quits and the Hohs signed the treaty, the conclusion is that there were no tribes affiliated with the signers of the treaty. (R. 662). The decision also excludes the Chinooks (R. 663) from the list of affiliated Indians.

The Circuit Court of Appeals, in construing this Act, makes it apply only to Indians living on the Quinaielt Reservation or on some small execu-

tive order reservations in that vicinity. (R. 637, 638, 339, 640). The opinion of the Court of Appeals on page 639 of the record states that under the General Allotment Act the Quillehute Indians residing upon the Quillehute Reservation, Hoh Indians residing upon the Hoh Reservation, Quit (Queets) Indians residing on the Quit (Queets) Reservation, were entitled to allotments upon these reservations specially set apart for their use. The court on page 640 of the record dwells upon the necessity of these Indians residing on these little executive order reservations in order that they may be permitted, under the Act of 1911, to elect to take allotments on the Quinaielt Reservation rather than on their own reservation, and the court, in applying this doctrine to petitioners, holds that they are not entitled to allotments because they never had any reservation. We answer that the Quit or Queets never had a reservation. See Bureau of American Ethnology, Bulletin 30, Part 2, pages 387, 388, 389, giving a list of all reservations in Washington. The Court's construction of the Executive Order of 1873 (See Appendix C and the Act of 1911; see Appendix F) in effect would exclude from allotment on the Quinaielt Reservation the Queets Indians, although this tribe is expressly mentioned in the Executive Order of 1873, (See Appendix C) for how could the Queets elect to take allotments on the Quinaielt Reservation rather than

on their own reservation when they had no reservation, hence no election. (R. 317, 318, 319, 320, 325).

The Supreme Court of the United States has never construed the Act of March 4, 1911, in its relation to the Executive Order of November 4, 1873, to indicate what was meant by the expression

> "other Indians in that locality and other fish-eating Indians of the Pacific Coast."

V.

Circuit Court of Appeals Holds Petitioners Not Entitled to Allotment Because They Are American Citizens

The Circuit Court of Appeals hold that these petitioners are American citizens and are for that reason not entitled to allotment as Indians (R. 651). In this connection the Court speaks only of the two children of Lizzie Rolfson, but there is no question but that this theory runs through the entire decision.

The decision on this point fails to take into consideration the Acts of Congress beginning with that of February 8, 1887, (See Appendix D) down to and including the Act of June 2, 1924, (43 Stat. L. 253 c. 233) (Appendix G), preserving to Indian citizens their rights to tribal property and tribal lands.

The ruling of the Circuit Court of Appeals, holding that because an Indian is a citizen of the United States he loses all right to his tribal property, is a matter of great public importance and affects every Indian within the territorial limits of the United States.

VI.

The Circuit Court of Appeals holds that petitioners, whose parents and grandparents have been duly enrolled, recognized and allotted as Quinaielt Indians, must themselves be adopted into the tribe as Quinaielt Indians before they can be entitled to allotments. (R. 648-649-652). We find no precedent for such ruling and we submit that the same is against the law and the decisions of the Courts and the Department of the Interior.

WHEREFORE, it is respectfully submitted that this petition should be granted.

OVERTON G. ELLIS,
A Member of the Bar of this Court,
Solicitor for Petitioners,
Tacoma, Washington.

STUART H. ELLIOTT,
H. G. ROWLAND,
DIX H. ROWLAND,
Counsel for Petitioners,
Tacoma, Washington.

BRIEF IN SUPPORT OF PETITION

JURISDICTION.

The Circuit Court of Appeals, Ninth Circuit, on February 24, 1930, entered decrees in favor of respondent and against the petitioners in the several cases herein, which had been combined for purposes of trial and appeal, reversing the decree of the trial court in each case. (R. 670 to 686 inclusive). This Court has jurisdiction under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. (43 Stat. 936).

STATEMENT.

The facts and a statement of the questions presented sufficiently appear in the Petition.

SPECIFICATIONS OF ERRORS

The Circuit Court of Appeals erred as follows:

1. In holding that petitioners are not entitled to allotment, although it appears that petitioners are either Quinaielt Indians or other fish-eating Indians of the Pacific Coast contemplated by the Executive Order of November 4, 1873, and notwithstanding the fact that the Quinaielt Reservation was enlarged from 10,000 acres to 224,000 acres, especially to provide for them, and although petitioners, at the time of applying for allotment, lived in the original tribal habitat of their ancestors, where many members of their families have been allotted, and although petitioners have been denied

by respondent the right to go upon or reside upon the reservation.

2. In applying to petitioners the rule of necessity of prior residence as a condition to allotment on the Quinaielt Reservation, which is a heavily timbered area and unfit and unsuited for a home until the land is cleared.

3. In holding petitioners to be without right of allotment because of non-residence on the Quinaielt Indian Reservation, such reservation being specifically covered by an executive order which provides for *other Indians in that locality*, and there being a specific act of Congress expressly providing for allotments from surplus land *after allotments to Indians on such reservation have been completed.*

4. In refusing to hold that petitioners who are children of an Indian woman and a white man whose marriage occurred prior to the passage of the Act of June 7, 1897, are entitled to allotment, the fact being that petitioners and their mother were and now are living in their original tribal habitat and in the same place where such Indian mother was recognized, enrolled and allotted as a Quinaielt Indian.

5. In applying the Act of June 7, 1897, to such of petitioners as are children of an Indian father who was duly recognized, enrolled and al-

lotted as a Quinaielt Indian, and in refusing to hold that said Act of June 7, 1897, only applies to the children of an Indian woman and a white man.

6. In applying the Act of June 7, 1897, to such petitioners as are children of an Indian father and an Indian mother, where either the father or mother or both were duly recognized, enrolled and allotted Indians of the Quinaielt Indian Reservation, and in refusing to hold that said Act of June 7, 1897, applies only to the children of an Indian woman and a white man.

7. In refusing to consider material the facts that the delay in allotting the reservation was caused by the unlawful acts of the respondent and its officers and representatives, through no fault of petitioners, and that, by reason of such delay, petitioners were forced to live and work away from the reservation at some gainful employment.

8. In holding that petitioners are without the right of allotment on the Quinaielt Indian Reservation for the reason that petitioners have in a measure adopted the habits and customs of civilized life by living in mixed white and Indian communities off the reservation, the sites of which communities are the original habitat of the tribe or band to which their progenitors belonged.

9. In denying petitioners' rights to allotments of land on the Quinaielt Reservation on the

ground that only the descendants of the tribes and bands of Indians who signed the treaty of 1855 and 1856 are entitled to allotment on this reservation, notwithstanding that the special act of Congress, the Act of March 4, 1911, (See Appendix F), expressly provides for allotment to "*other tribes of Indians in Washington* who are affiliated with the Quinaielt and Quillehute Indians in this treaty after allotments to Indians on the reservation have been completed.

10. In holding that certain of petitioners who are citizens of the United States are by reason thereof not entitled to allotments of land on the Quinaielt Indian Reservation. (R. 651).

11. In holding that children of duly recognized, enrolled and allotted Quinaielt Indians must be adopted into the Quinaielt tribe before being entitled to allotments of land on the Quinaielt Indian Reservation. (R. 652).

CASES HEREIN TO WHICH EACH SPECIFICATION OF ERROR APPLIES

(a) Of the above Specifications of Error, Numbers 1, 2, 3, 7, 8, 9 and 10 are made for and are applicable to the cases of all the petitioners in all the cases herein consolidated for trial and appeal.

(b) Specification of Error Number 4 is made in behalf of, and is applicable to, the case of the

petitioners in the actions wherein Virginia Walkowsky, et al. are petitioners; to the case wherein Agnes Rubens, et al. are petitioners; and to the case wherein Alvin Smith et al. are petitioners.

(c) Specification of Error Number 5 is made in behalf of and is applicable to the case of the petitioners in the actions wherein Hilary Halbert, Jr., et al. are petitioners; to the case wherein Rich Halbert is petitioner; to the case wherein Vernon Sidney Halbert is petitioner; to the case wherein Sidney Seth Halbert is petitioner; to the case wherein Edna May Elliott, et al. are petitioners; and to the case wherein Charles G. Elliott, Jr., et al, are petitioners.

(d) Specification of Error Number 6 is made in behalf of and is applicable to the case wherein Lulu M. Elliott, et al. are petitioners; to the case wherein Mary Barichio Petit, et al. are petitioners; to the case wherein Dewey Barichio, et al. are petitioners; and to the case wherein Rose Peers Pickernoll, et al. are the petitioners.

(e) Specification of Error number 11 is applicable to all the cases herein which were combined for the purposes of trial and appeal, excepting the case in which Mary Francis Provoe, et al. are petitioners, and in the case in which Rose Peers Pickernoll, et al. are petitioners.

ARGUMENT.

I.

THE EXECUTIVE ORDER OF NOVEMBER 4, 1873 (Appendix C) AND THE ACT OF MARCH 4, 1911, (Appendix F), WERE INTENDED TO PROVIDE FOR NON-RESERVATION INDIANS OF SOUTHWESTERN WASHINGTON.

The opinion of Circuit Court of Appeals holds that the Executive Order of November 4, 1873, applies only to Quinaielt, Quillehute, Hoh, Ozettes and Quits or Quaitso (Queets) Indians, and then states that the Hoh Indians and the Quits or Quaitso Indians are bands of Quinaielts, and the Quits or Quaitso (Queets) were a part of the Quinaielt tribe. This leaves only the Ozettes, numbering but 44 in 1901 and 35 in 1906 (R. 638, 639) for whom the reservation was enlarged.

It would therefore appear that the Hoh and the Queets were entitled to allotment under the Treaty, and there would have been no necessity of an Executive Order or the Allotment Act of 1911 to cover these. That raises the question: Was the Executive Order of 1873 promulgated and the reservation enlarged from 10,000 to 224,000 acres for the purpose of alloting but 44 or 35 Indians?

This view, in our opinion, is inconsistent with a proper understanding and conception of the purposes of the Executive Order of November 4, 1873,

and the Act of March 4, 1911. (See Appendix C and F).

The petitioners herein qualify as Quinaielt Indians or other Indians in that locality, and as fish-eating Indians of the Pacific Coast as established by the record and found by the trial court.

All the petitioners herein, at the time they were entitled to apply for allotments on the Quinaielt Indian Reservation, were living in the original tribal habitat of their ancestors, as set forth in the petition herein.

Governor Isaac I. Stevens, under authority of the President and Congress, negotiated treaties and dealt by means of treaties with all the Indians of Western Washington, save and except certain tribes and bands of Southwestern Washington. These treaties are known as The Treaty with the Makah (12 Stat. L. 939), Treaty with Nisqually, etc. (10 Stat. L. 1132), Treaty with the Dwamish, etc. (12 Stat. L. 927), Treaty with the Quinaielts, etc. (12 Stat. L. 971). It was his intention to deal with and provide for all the Indians of Southwestern Washington. (R. 385, 386, 387, 545 to 553) (Swan's Three Years at Shoalwater Bay, pages 337-344).

The Governor, carrying into effect his policy of summoning groups of Indians of the same racial stock, language, custom and affiliation, called together on February 25, 1855, 350 representatives of

the Lower and Upper Chehalis, Quinaielt, Quillehute, Chinook and Cowlitz Indians, which then numbered 843. He failed in securing the signatures of all these tribes, except the Quinaielt, Quillehute and one Lower Chehalis. (R. 386, 334). This left the Lower and Upper Chehalis, Chinooks and Cowlitz fish-eating Indians of the Pacific Coast of Washington unprovided for. Hence the necessity for the Executive Order of November 4, 1873, the promulgation of which was further made necessary because Congress had on March 3, 1871, passed an act forbidding further treaties with Indian nations, tribes or powers. (See Appendix B).

All these petitioners were denied by the respondent the right to go upon, reside upon or locate upon the reservation. (See Statement in Petition, page 15).

II.

Physical Condition of Reservation—Its Importance

The physical conditions of this reservation are as set forth in the petition and preliminary statement, as disclosed by the record. (R. 383, 404, 426, 446, 500).

It is argued by respondent and found by the Circuit Court of Appeals that the requirement as to settlement and location on this reservation is based upon Article 6 of the Treaty with the Omahas.

We contend on behalf of the petitioners that Article 6 of the Quinaielt Treaty is based upon Article 6 of the Omaha treaty, so far as it concerns residence and location on this reservation, and Article 6 of the Quinaielt Treaty clearly states, with reference to the Omaha Treaty, that the same shall apply

"so far as the same may be applicable."

We may well conclude that the treaty makers had in mind the physical condition of the Quinaielt Reservation as distinguished from that of other reservations of open prairie or agricultural land, adaptable at once for means of livelihood and upon which the Indians could immediately move and make a living.

Those responsible for the Executive Order of 1873 and the Allotment Act of 1911 had this in mind when they both definitely provide for Indians other than those living or located on the reservation.

III.

Purpose of Executive Order of November 4, 1873. (Appendix C)

The Executive Order of November 4, 1873, (see Appendix C) had three distinct objects:

1. To provide sufficient lands to allot the Quinaielt and Quillehute Indians under the provisions of this treaty.

2. To provide for other Indians in that locality.

3. To provide for other tribes of fish-eating Indians on the Pacific Coast.

The wording and meaning of the Executive Order are not doubtful (See Appendix C), and the holding of the Circuit Court of Appeals, that only Quinaielt, Quillehute, Hoh, Quit and Ozette Indians actually living on a reservation are entitled to allotment, is plainly erroneous. The so-called reservation of the Hohs, Ozettes and Quillehutes are but a single section or one and one-third sections of land. (Handbook of American Indians, Part 2, page 388). Few Indians live upon them and certainly the Indians of these tribes could not elect to take allotments on their own reservations for none of these reservations is large enough to allot more than a handful of Indians.

There was no authority to allot under the Executive Order, hence the General Allotment Act of 1887 and the Special Allotment Act of March 4, 1911 (See Appendix F) were passed. The latter act expressly provided for allotments of lands to Indians after the Indians on the reservation had been allotted, showing that residence on the reservation was not necessary. To make this clear, the act further provided for such Indians as are affiliated with the Quinaielts and Quillehutes in the

Treaty of 1855 and 1856. This simply carried out the provisions of the Executive Order.

The respondent at the time of trial admitted that the Executive Order of November 4, 1873, and the Allotment Act of March 4, 1911, were made in conformity each to the other and must stand together,

> "and not for the purpose of one repealing the other." (R. 446, 447).

OPINION OF SOLICITOR FOR INDIAN DEPARTMENT (Quoted by District Court, R. 295-326).

The Solicitor for the Interior Department held that the scattered fish-eating Indians of Southwestern Washington were affiliated with the Indians who had signed the treaty, and the Department, adopting that opinion as its allotment instructions, has consistently allotted on the Quinaielt Indian Reservation not only Quinaielts and Quillehutes, but also Upper and Lower Chehalis, Chinook and some Cowlitz Indians without requiring adoption or residence on a reservation. (See Preliminary Statement in Petition).

In 1872 the Superintendent of Indian Affairs for Washington Territory reported and recommended that all tribes made parties to the Quinaielt Treaty, together with the remnants of the Chehalis, Humptulips, Shoalwater Bay and Chinook tribes, residing along the coast south of the reservation to

the mouth of the Columbia River, and the Makah tribe, residing at Cape Flattery, north, are emphatically fish eaters, and draw their subsistence almost wholly from the water, and therefore have but little taste or desire for agriculture or land production, and that the reservation be enlarged for them. The reservation was, as a result of this recommendation, enlarged to nearly 224,000 acres to provide for them. (R. 298, 299). The Solicitor for the Department of the Interior, in an opinion to the Secretary dated in 1916 quoted by the District Court (R. 295-326) and introduced in evidence, reviews all the previous decisions of the Department and concludes that the term "fish-eating Indian of the Pacific Coast" did not include all bands and tribes west of the Cascade Mountains, but that it did include the fish-eating Indians in Washington

> "South of the Neah Bay or Makah Reservation to the mouth of the Columbia River" (R. 324)

The Solicitor thus construed the Executive Order of November 4, 1873. In construing the Act of March 4, 1911, the Solicitor said,

> "The Indians along the Pacific Coast of Washington described as 'fish-eating Indians' are more or less affiliated although divided into numerous tribes and bands." (R. 325).

The District Court followed the Solicitor's opinion and concluded (R. 327) that, aside from the

Quinaielts and Quillehute Indians, the Indians of the Chehalis, Upper and Lower, Chinook, Cowlitz, and the so-called Shoalwater Bay bands are entitled to allotments on the Quinaielt Indian Reservation.

The District Court in construing the Act of March 4, 1911 (Appendix C), concluded that the word "treaty" in this act was used in the broad sense to include not only the treaty itself as finally signed, but the prior negotiations in which all these Indians participated, held at Cosmopolis, Washington, in February, 1855. (R. 336). It is only by taking this view that the enlargement of the Quinaielt Indian Reservation from 10,000 acres to 224,000 acres can be explained, and it is only by placing this construction upon the word "treaty" as used in the Act of March 4, 1911, that the action of the Department of the Interior in allotting 1414 Indians upon this reservation, members of the tribes and bands above mentioned, without adoption and without requiring residence, can be satisfactorily explained.

IV.

Erroneous Application of Act of June 7, 1897 (Appendix E)

Where Parents Were Married Prior to 1897.

The petitioners, Virginia, Alvin and Catherine Walkowsky, were born of a marriage solemnized January 9, 1893. Their mother was a duly en-

rolled, recognized and allotted Quinaielt Indian. (R. 521-522).

The petitioners, Eugene Smith and Alvin Smith, were born of a marriage solemnized in February, 1877. (R. 472). The Circuit Court of Appeals finds that the mother, Lizzie Rolfson, from her birth, was and is an Indian entitled to all the rights of an Indian upon the Quinaielt Indian Reservation, (R. 652).

The petitioners, Agnes Rubens, Louise Henry Peterson, Mary Henry Hagen, Chris Henry, Jr., Christine Henry and June Henry, were born of a marriage solemnized in the year 1890. (R. 491). The mother of above named, Louise E. Henry, is a duly recognized, enrolled and allotted Quinaielt Indian.

The holding of the Circuit Court of Appeals, in denying these petitioners the right to allotment, is contrary to the applicable authorities, as these petitioners are clearly saved by the provisions of the Act of June 7, 1897. (See Appendix "E"). The following cases are directly in point:

Oakes, et al. vs. United States, (172 Fed. 305);

United States, ex rel Besaw, vs. Work, (6 Fed. (2nd) 694);

Vezina vs. The United States, (245 Fed. 411);

Pape vs. U. S., (19 Fed. (2nd) 219);

Agnes Elliott vs. U. S., District Court Western Washington (E-272) Unreported;

Crichton vs. Shelton, (33 Land Decisions 205);

Addie Prickett, et al. (50 Land Decisions 554);

Allotment Rules and Regulations of Department of the Interior (R. 525 and set forth in Appendix "H");

(Solicitor's Opinion, R. 295 to 326).

V.

SAME—WHERE FATHER IS AN INDIAN

The decision of the Circuit Court of Appeals makes the Act of June 7, 1897, apply to the case where the father is an Indian. This we contend was error.

We know of no better case on this point than the decision of this same Circuit Court of Appeals in the case of *Pape vs. The United States*, (19 Fed. (2nd) 219), where, speaking of mixed marriages between Indians and whites, it is said:

> "Our conclusion is that the status of Eugene *follows the condition of the father*, and the decree of the District Court must be sustained. *Smith vs. Bonifer* (CC) 154 Fed. 883."

See also the recent case of *Francis C. Mounts, et al, vs. the United States,* (Opinion of Attorney General, November 1, 1929, SWR-M 90-2-11-143 A. L.), in which case all the children of an Indian father and a white mother were allotted on this reservation, and neither father nor the children lived thereon. (See Appendix "J").

The petitioners affected by this error are set forth following Specification of Error No. 11 in paragraph (c), page 41.

VI.

Same—Where Both Father and Mother Are Indians

The decision of the Circuit Court of Appeals applies the Act of June 7, 1897, to cases wherein both the father and the mother are Indians.

We contend that the act has no application to this state of facts. We know of no decision of any court which places this construction on this Act.

The petitioners affected by this error are as set forth following Specification of Error No. 11 at paragraph (d), page 41.

The Circuit Court of Appeals in its decision goes so far as to deny the children of an Indian father and an Indian mother their right to an allotment where both the father and mother are duly enrolled, recognized and allotted Quinaielt Indians.

(Case of *Lulu Elliott, et al. vs. the United States*, No. 312-E).

The above facts are admitted by the pleadings. (R. 130-136).

VII.

The Interior Department in 1910 and 1911, when R. A. Ballinger was Secretary, held that Indians were not entitled to allotments on the Quinaielt Reservation on the ground that this land was classed by the Department as timber land (R. 428), and that the timber should be sold to private timber companies and the money paid thereon placed in a tribal fund. (See letter of January 19, 1914, written by E. B. Meritt, Assistant Commissioner of Indian Affairs) (Appendix "I"). The decision of this Court in the case of *Payne vs. U. S.*, 264 U. S. 446, (1924), definitely sets aside this theory and policy. Nevertheless the opinion of the Circuit Court of Appeals reversing the trial court bases its opinion upon a letter written by R. A. Ballinger, Secretary of the Interior, and dated February 18, 1910, (R. 641-643), and disregards the opinion of the Solicitor for the Interior Department written September 2, 1916, almost seven years later, this opinion being written at the request of Secretary of the Interior Franklin K. Lane. All of the important facts in this connection are set forth in the opinion of the trial court. (R. 285 to 326).

The letter of Secretary Ballinger, above referred to, was not introduced in evidence at the trial of the cause, nor was any reference made to it. It appears first in the record in the opinion of the Circuit Court of Appeals. This could readily have been answered by the contemporaneous records of Congress. We think it is sufficiently answered by the opinion of the Solicitor for the Interior Department cited by the District Court and admitted to be the allotment instructions at the time of the trial. (R. 439-440-441).

Conforming to Acts of Congress and previous policy and rulings of the Department of the Interior, Secretary of the Interior Wilbur, under date of June 8, 1929, announced his policy of dealing with Indian affairs in an article in the Saturday Evening Post entitled "Uncle Sam Has a New Indian Policy." The article stated his policy, placing no penalty upon non-resident Indians, but encouraging them to live, associate and mingle with their white neighbors, not from necessity as in these cases, but as a matter of policy in the attempt to solve a question long perplexing to the Department and the country at large.

VIII.

PETITIONERS HAVE LIVED ALL THEIR LIVES IN THE ANCESTRAL HABITAT OF THEIR TRIBES.

The matter of non-residence and the adoption of the habits and customs of civilized life has been

heretofore discussed, but, in this connection and in addition to what has been stated, the record is conclusive that all petitioners live in the tribal habitat of the fish-eating Indians of Southwestern Washington and the Pacific Coast. The adult petitioners and the parents of the minor petitioners are engaged in the occupation of fishermen, as have been their ancestors from time immemorial. Their condition has not changed in any respect, save from contact with white people who have moved in and around them. These cases are not cases where there has been any change in the status of the petitioners. Their status and location in 1873, when the Executive Order was promulgated, was identical with their status and location in 1911, when the Allotment Act was passed, and their status and location was the same at the time of their application for allotments. They are in no respect different from the majority of the 1414 Indians who have already been allotted without regard to residence, and are members of and belong to tribes and bands of Indians which the Department of the Interior has, for the past 25 years, held and ruled were entitled to rights on the Quinaielt Reservation.

IX.

Specification of Error No. 9 has been heretofore discussed in argument of Specification of Error No. 3.

X.

The General Allotment Act of February 8, 1887, (24 Stat. L. 388, Sec. 6), made all Indians allotted under the act, as well as other Indians, citizens of the United States, but it also preserved their rights in tribal property and tribal lands. The Circuit Court of Appeals, in the case herein, wherein Alvin Smith and Eugene Smith were plaintiffs in the District Court, denied the allotments sued for because these plaintiffs were citizens of the United States. All the numerous Acts of Congress pertaining to Indians passed since the Act of 1887 down to and including the Act of June 4, 1924 (Appendix "G"), preserved to Indians who had become citizens their rights in tribal property and tribal lands. This holding of the Circuit Court of Appeals is, we submit, contrary to the statute and affects every Indian in the United States, for under the provisions of the last named Act, all Indians are made citizens of the United States.

XI.

The decision of the Circuit Court of Appeals, in these cases, in holding that children of duly recognized and allotted Quinaielt Indians must be adopted into the tribe before they are entitled to tribal rights, presents a legal principle not heretofore approved by any court so far as we have been able to find. It seems opposed to all known concep-

tions of the rights of children of recognized Indians.

The Act of June 7, 1897, if applicable, (25 U. S. C. A. 184), was passed expressly to provide for and save the rights of such Indians as the children of Lizzie Rolfson, and the other petitions who are the offspring of marriages contracted before the passage of the Act. All cases that have been cited by petitioners and respondent, including the case of *Oakes, et al, vs. United States*, (172 Fed. 305), so strongly relied upon by respondent, sustains this position.

A historical inadvertence is found in the opinion of the Circuit Court of Appeals at page 634 of the record, where it is stated that the Territory of Washington at one time included the present State of Oregon.

Distinction Between These Cases and Lemieux v. United States.

It is to be noted that the Circuit Court of Appeals gives great weight to the decision of *Lemieux vs. the United States*, (15 Fed. (2nd) 518). That case was decided against the plaintiff because he was guilty of laches in bringing suit. A dictum in the case discusses residence, but it has no application to the present cases. In the Lemieux case, there was no Executive Order and no special Allotment Act providing for Indians not living on the reservation. The *Lemieux* case, moreover, distinguishes

the case of *Bonifer vs. Smith*, 166 Fed. 846, where non-reservation Indians were allotted because of special Allotment Acts following a treaty similar to the Treaty of 1855 and 1856 with the Quinaielt Indians.

The decision of the Circuit Court of Appeals at page 669 of the Record, criticises petitioners and their counsel for not exhausting their efforts with the Department of the Interior before bringing these suits. This criticism is unwarranted. The Circuit Court of Appeals entirely overlooks the testimony at Page 528 of the record, which shows that petitioners gave the Department of the Interior every possible opportunity to allot them before any suits were begun, and it also overlooks the fact that additional evidence was about to be offered to show this when respondent stipulated as follows:

> "It is here stipulated by the parties in all the cases on trial herein, that the plaintiffs in each instance have made selections for allotments and that the allotments have been objected to by the Department." (R. 528).

Again upon pages 643 and 644 of the record the Circuit Court of Appeals makes this comment:

> "* * * the applicants, notwithstanding their small proportion of Indian blood, are alleged to be Indians and this allegation seems to be admitted."

The fact that this comment was made, in the face of its conceded immateriality, has led us to fear that the decision was in some measure influenced by a belief that the petitioners are of small degree of Indian blood. However the court may have fallen into this error, the facts show that Indian blood is predominant in a large number of the petitioners. For example, the Barichios and Petits (R. 569), and Provoes (R. 581-587) are Indians on both sides of the family, as are the children of J. H. and Josephine Johnson Elliott. (R. 130-136). Kate Walkowsky Weiss (R. 521) is a full blood and her children are half bloods. Certainly the court did mean that the rights of these and the other petitioners in whom Indian blood predominates should be prejudiced because some of the petitioners might be of a lesser degree of Indian blood.

Distinction Between These Cases and Case of Wilbur, etc. v. United States, ex rel. Kadrie

We note the recent case of *Ray Lyman Wilbur, Secretary of the Interior, vs. United States ex rel. Kadrie, et al.* (30 Fed. (2nd) 989) (United States Supreme Court Advance Opinions, No. 10, 1929 Term, p. 433) decided by this Court April 14, 1930, upon a petition for Certiorari, and that this decision is to the effect that mandamus will not lie against the Secretary of the Interior to require him to place certain names of Indians upon an an-

nuity roll for money payments after the names had been stricken by an order of the Secretary following an opinion by the Solicitor for that Department.

This petition presents no such question. The petitioners are here proceeding under definite acts of Congress giving them the right to sue for allotments and perforce to ask final judgment for their allotments from the court to which they may appeal.

Upon several occasions this Court has had these acts of Congress before it:

In the case of *Leecy vs. United States*, (190 Fed. 289), (*Appeal dismissed* 232 U. S. 731) the decision of the Circuit Court of Appeals for the 8th Circuit said:

> "* * * The act of February 6, 1901, (31 Stat. 760, c. 217) provides:
>
> "* * * It is manifest that no Indian would have occasion to seek relief under this statute until his right had been denied by the Interior department. It is certain that the purpose of this statute was to confer substantial rights upon Indian claimants, and yet it is insisted that, as allotments must be reported to the Secretary of the Interior for his approval, the absence of his approval would defeat the suit, when, of course, no one would want to bring a suit if he had that approval.
>
> "The claim of power under sections 441 and 463, R. S., is subject to the same criticism.

Why authorize a suit, if either of the sections conferred upon the Secretary of the Interior or upon the Commissioner of Indian Affairs general authority conclusive on the courts? Certainly Congress did not mean to authorize the bringing of wholly futile actions. A strong argument is made tending to show that power should be vested in the President or some other officer of the government to withhold from allotment lands specially needed for use of the tribe as a whole, but such arguments should be addressed to Congress rather than to the courts. If such a law would be wise, that is no reason why an executive department should make one, or the courts sustain it in doing so."

The Act of February 6, 1901, (31 Stat. L. 760 c. 217) had received further construction in the cases of *Sloan vs. U. S.*, 118 Fed. 283, (*appeal dismissed*, 193 U. S. 614), where it is said:

"This section was intended to vest the United States Courts with full authority to hear and *determine every question* arising in any suit brought by a claimant to an allotment; *and the fact that such questions have been decided by the land department adversely to the claimant neither affects the court's jurisdiction nor concludes it on any matter of law or fact.*"

Also see cases of *Morrison vs. Work*, 266 U. S. 481, *Hy-yu-tse-mil-kin vs. Smith*, 119 Fed. 114, and 194 U. S., 401, *Waldron vs. U. S.*, 143 Fed. 413, and cases cited. Also *Sully vs. U. S.*, 195 Fed. 113.

CONCLUSION

The petitioners are Indians and it is difficult for them to understand, or for counsel to explain to them, the ruling of the court which denies them allotments upon the Quinaielt Indian Reservation when a large number of their neighbors and relatives, in exactly the same situation, have been, without adoption and without prior residence on any reservation, allotted upon the same reservation. The policy adopted and pursued by the Department has been that of allotting the Quinaielt Reservation, without the necessity of prior residence and without the necessity of adoption into the Quinaielt tribe, to the fish-eating Indians of Southwestern Washington who are affiliated with the Quinaielts and Quillehutes in the Treaty of 1855 and 1856, in compliance with the Special Allotment Act of March 4, 1911, following the Solicitor's opinion and of alloting Quinaielt Indians who did not live upon a reservation. This course of dealing has placed a construction upon the Executive Order of November 4, 1873, and the Special Allotment Act of March 4, 1911, which these simple unlearned fishermen should be permitted to rely upon, for this court has

frequently held that Indian laws and treaties should be construed, not according to the technical meaning of their words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. *Jones vs. Meehan*, 175 U. S. 1. *United States vs. Winans*, 198 U. S. 381.

We believe that the District Court, in dealing with the Quinaielt Indian Reservation and the right of petitioners to allotments on such reservation, was justified in following the opinion of the Solicitor for the Department of the Interior which that Department has consistently followed since 1916 and under which it has allotted upon the same reservation, since that time, seven hundred to eight hundred Indians, whose qualifications to receive allotments upon the Quinaielt Reservation are exactly the same as those of petitioners in these actions. We further believe that the construction placed upon the Executive Order of November 4, 1873, and the Act of March 4, 1911, by the District Court is the only one sustainable consistently with the previous and present policy of the Department of the Interior in dealing with this reservation. The District Court's interpretation of the meaning of the term "treaty" is that always placed upon it in the past by the officers of the Department of the Interior and it should not be abandoned now to the prejudice of these particular petitioners. The change of policy now sought to be imposed by the Depart-

ment falls far short of that essential good faith on the part of the United States which is required in dealing with a class of people who have been more or less considered as wards of the Government and who, at least as far as these rights are concerned, sustain that relationship now.

The remaining points have been sufficiently presented in the petition.

Respectfully submitted,

OVERTON G. ELLIS,
A member of the Bar of this Court,
Solicitor for Petitioners,
Tacoma, Washington.

*STUART H. ELLIOTT,
H. G. ROWLAND,
DIX H. ROWLAND,
Counsel for Petitioners,
Tacoma, Washington.

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*Stuart H. Elliott, counsel above, is not an Indian and is in no manner related to any of the petitioners herein.

APPENDIX

A—TREATY WITH THE QUINAIELT, ETC., 1855-1856:

"Article 5. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

"Article 6. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyd into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and

will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable * * *"

(Indian Affairs Laws and Treaties. Kappler, Vol. 2, page 719, 12 Stat. 971.)

B—ACT OF MARCH 3, 1871:

"No Indian nation or tribe within the Territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty, but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

(16 Stat. 566, R. S. 2079.)

C—THE EXECUTIVE ORDER OF NOVEMBER 4, 1873:

"In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians"—"and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory"—"be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast."

(Kappler, Ind. Laws & Treaties, Vol. 1 (2nd Ed.), pp. 923-924.)

D—ACT OF FEBRUARY 8, 1887 (GENERAL ALLOTMENT ACT):

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impair-

ing or otherwise affecting the right of any such Indian to tribal or other property."

(24 Stat. 388) (25 U. S. C. A. 331).

E—ACT OF JUNE 7, 1897:

"That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right."

(30 Stat. 90.) (25 U. S. C. A. 184).

F—ACT OF MARCH 4, 1911:

"That the Secretary of the Interior be, and is hereby, authorized and directed to make allotments on the Quinaielt Reservation, Washington, under the provisions of the allotment laws of the United States, to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-fifth, eighteen hundred and fifty-six, and who may elect to take allotments

on the Quinaielt Reservation rather than on the reservations set aside for these tribes;

Provided, that the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed."

(36 Stat. 1345).

G—ACT OF JUNE 2, 1924:

"All Indians born within the territorial limits of the United States are declared to be citizens of the United States. The granting of citizenship to Indians shall not in any manner affect the right of any Indian to tribal or other property."

(c. 233, 43 Stat. 253).

H—SECTION 324 OF THE ALLOTMENT REGULATIONS 1904 OF THE INTERIOR DEPARTMENT:

"Under Section 324 of the Regulations, 1904, and amendments thereto, children born to properly enrolled members of the tribe are entitled to enrollment with their parent or parents. This includes cases where the mother is an Indian woman married on or prior to June 7, 1897, to a white man and living apart from the tribe, and the mother was recognized by the tribe as belonging thereto by blood, or was so recognized at the time of her death. It is not essential to enrollment that the children be so recognized

nor that they be born on the reservation or among the Indians."

Act of June 7, 1897 (30 Stat. 90); and Solicitor's opinion of June 16, 1924, in the case of *Addie Prickett et al* (50 L. D., 554).

I—LETTER FROM THE COMMISSIONER OF INDIAN AFFAIRS UNDER DATE OF JANUARY 19, 1914:

"M. Peter E. Jackson,
"Port Gamble, Wash.

"..... .

"As delegates of the tribes, these two Indians were further advised that under the general allotment act we are confined to a given number of acres of agricultural or grazing lands, and that such law did not contemplate the allotment of lands chiefly valuable for timber purposes; that timber valuable for commercial purposes was regarded as a tribal asset, to be administered for the benefit of the tribe at large rather than given to individual Indians by an allotment of land in severalty. It was stated, further, that the office hoped to market this timber at a satisfactory price, and, when the timber had been removed, to allot the lands to Indians then found entitled, according to their character and value for agricultural and grazing purposes.

"Inadequate transportation facilities within and adjacent to the Quinaielt Reservation renders it difficult to find a ready and satisfactory market for the valuable timber there, and until these conditions are improved, or until the price of lumber per thousand feet increases materially, it is doubtful whether it would be wise to dispose of this timber in the immediate future. If by holding on for two or three years longer the price per thousand feet can be doubled, it will augment greatly the income of the Indians from this tribal asset.

"Allotments have heretofore been made to some 690 Indians within the Quinaielt Reservation, covering, in the aggregate, some 54,989 acres. A special allotting agent was on this reservation with a view of continuing the work there, but owing to the number of Indians entitled, and the fact that practically all the agricultural and grazing lands had theretofore been allotted, it became necessary to suspend field operations until the timber on the tribal lands can be disposed of.

"

"(Signed) E. B. MERITT,
"Assistant Commissioner."

J—OPINION OF HONORABLE JAMES M. DIXON, FIRST ASSISTANT SECRETARY OF THE INTERIOR, IN

CASE OF FRANCIS C. MOUNTS, ET AL, V. THE UNITED STATES (NO. 385 EQUITY, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION):

Address Reply to
"The Attorney General
and refer to Initials and Number:
SWR-M
90-2-11-143 A. L.

RECEIVED
Office of U. S. Attorney
Nov. 6, 1929.
Seattle, Wash.
Ref. to PCR:FEB

DEPARTMENT OF JUSTICE
Washington, D. C.
November 1, 1929.

Anthony Savage, Esq.,
United States Attorney,
Seattle, Washington.

Re: FRANCIS C. MOUNTS ET AL, V. UNITED STATES, No. 385 Equity

Sir:

There is transmitted herewith copy of a letter dated October 21, 1929, from the First Assistant Secretary of the Interior, relative to the above-entitled matter, which letter is self-explanatory.

As you will observe, the Interior Department has arrived at the conclusion that the plaintiffs in this case are entitled to enrollment and allotment upon the Quinaielt Indian Reservation. In view of this, it is suggested that you proceed no further in the defense of this case, and close the matter in your file.

Respectfully,

For the Attorney General,

(Signed) SETH W. RICHARDSON
Seth W. Richardson
Assistant Attorney General.

Enc. 59257

RECEIVED
Office of U. S. Attorney
Nov. 8, 1929,
Tacoma, Wash.
Ref. to .....

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY
WASHINGTON

Oct. 21, 1929

The Honorable
The Attorney General.

My dear Mr. Attorney General:

Further reference is made to your letter of June 21, 1929, transmitting for a report a

photostatic copy of the bill of complaint in the case of *Francis C. Mounts et al v. the United States*, No. 90-2-11-743, in the United States District Court for the Western District of Washington, Southern Division.

On page 2 of the report to your Department it was stated that further facts would be obtained from the agency relative to the rights of the plaintiffs in this suit, and if it is found that they are entitled to the rights sought a recommendation would be made that the United States District Attorney be auhorized to end the suit by stipulation.

Investigation of this matter develops the fact that Frank Mounts, the father of the plaintiffs, was enrolled by adoption and his enrollment was approved August 30, 1909. The oldest of the plaintiffs is 19 years of age. It is clear, therefore, that all the plaintiffs were born after the adoption of their father into the Quinaielt Tribe of Indians. *It further appears that these people have never resided upon the Quinaielt Reservation.* However, it further appears that the father has never abandoned his tribal affiliation as he has always taken an active part in tribal affairs and often, though his residence is away from the tribe and his wife is a white woman, he has held tribal office and is now Vice President of the Quinaielt tribal council.

In view of the fact that the father of these children does not appear to have abandoned his tribal relations as shown by his position as a tribal officer, these children are entitled to enrollment and allotment on the Quinaielt Indian Reservation. It is therefore recommended that the proper United States District Attorney be instructed to take appropriate action to end the litigation already commenced in this case.

Had an application been properly made on behalf of these children and forwarded to this Department with a statement of all the above facts there would have been no necessity for the institution of a suit in this case.

A copy of this letter is being transmitted to the Superintendent Taholah Indian Agency as instructions to enroll and allot these plaintiffs.

Very truly yours,

(Signed) JAS. M. DIXON,
First Assistant Secretary

Filed in the United States
District Court, Western District
of Washington, Southern Division,
November 26, 1929.
Ed M. Lakin, Clerk
By E. Redmayne, Deputy.